Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1132

WATERBURY PETROLEUM PRODUCTS, INC.,

Petitioner,

v.

JOHN B. HULL, INC., THE SANDMEYER OIL COMPANY, COMMUNITY PETROLEUM PRODUCTS, INC., and DUTCHESS AUTO CO.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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Respondents, John B. Hull, Inc., The Sandmeyer Oil Company, Community Petroleum Products, Inc., and Dutchess Auto Co., respectfully request that this Court deny the petition for a writ of certiorari seeking review of the Second Circuit's opinion in this case. That opinion is reported at 588 F.2d 24.

Questions Presented

Petitioner does not accurately set forth the questions presented. The actual questions presented are:

1. Should this Court consider whether injury to competition is an element of subject matter jurisdiction, where the complaint alleges a claim under the Robinson-Patman Act and the Court of Appeals found a sufficient showing of

injury to competition, even if it were a jurisdictional prerequisite?

2. Should this Court review, prior to trial, the sufficiency of proof of injury to competition?

Statute Involved

The petition involves Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13 (a), the text of which is reprinted in the appendix to this brief at pages 13-14.

STATEMENT OF THE CASE

I. Procedural Background

This case comes to the Court on a petition for writ of certiorari seeking review of a preliminary injunction.

The preliminary injunction simply mandates compliance with the Robinson-Patman Act, 15 U.S.C. § 13(a). It was issued after a five-day evidentiary hearing before a United States Magistrate. Seven witnesses testified, and sixty-nine exhibits were received into evidence. At the conclusion of the hearing, and after consideration of numerous legal memoranda, the Magistrate recommended the issuance of a preliminary injunction. (A 14-27).*

Upon the motion of Petitioner, pursuant to 28 U.S.C. § 636, there was a *de novo* review by the District Court of the proceedings before the Magistrate. The District Court "adopted, ratified and confirmed" the Magistrate's recommended ruling. (A 27). A preliminary injunction was thereafter issued.

* References in this form are to the Appendix to Petition for a Writ of Certiorari.

The Court of Appeals for the Second Circuit unanimously affirmed the order of the District Court with modifications. The modifications are irrelevant to the issues raised in the petition.

Throughout the proceedings, the parties actively engaged in discovery. Trial preparation is almost complete.

II. Factual Background

Respondents sell heating oil in certain contiguous areas of Connecticut, New York and Massachusetts which have been collectively referred to as the Northwest Corner. Respondents' annual sales of petroleum products range from $500,000 to $2,900,000.

Petitioner is a substantial, well-established petroleum business with annual sales of almost $4,000,000 in 1976. It sells heating oil in two separate and geographically distinct markets: Waterbury, Connecticut, and the Northwest Corner. Petitioner competes against each Respondent in the Northwest Corner.

Prior to September, 1976, Petitioner sold heating oil at the same price in both markets. Its business was profitable. In September, 1976, Petitioner substantially reduced its price for heating oil in the Northwest Corner, but did not reduce its price in Waterbury. During the following heating season, Petitioner raised its Waterbury price eight cents per gallon, but only raised its Northwest Corner price four cents per gallon. Its Northwest Corner price was below cost. During that season Petitioner lost over $160,000.

Petitioner's drastic and prolonged price cuts caused widespread diversion of customers in the Northwest Corner. Within two months Petitioner more than doubled the number of its Northwest Corner customers. However, it continued to increase the size of its discounts in the North-

west Corner, while granting no such discounts in Waterbury. Simultaneously, Petitioner commenced a disparaging advertising campaign which demeaned competitors in the Northwest Corner and withheld from customers the full terms of sale. The District Court found these practices were "at the very least misleading." (A 20).

After it became clear that Petitioner's actions would persist, Respondents commenced this action under the Robinson-Patman Act, 15 U.S.C. § 13(a), and moved for a preliminary injunction.

As the Magistrate's recommended ruling meticulously points out, Respondents proved each element of a Robinson-Patman Act violation. Petitioner's only witness was called as an expert to show that the discounts were cost justified. This testimony was found "beyond the realm of believability." (A 18).

The Magistrate noted that the unusually extensive preliminary injunction hearing permitted the court to conclude "with confidence" that Respondents will probably succeed on the merits. (A 23). The District Court and the Court of Appeals endorsed the Magistrate's conclusion.

III. Injury to Competition

The petition only challenges the decisions of the courts below on a single issue: whether Respondents proved "injury to competition." The proof of injury to competition was overwhelming.

The District Court based its finding of competitive injury on the following grounds:

1. Respondents proved price discrimination, but Petitioner failed to establish any statutory defense. (A 19).

2. Petitioner was selling below cost, from which the court inferred predatory intent. (A 20, 22).

3. Petitioner's persistent sales below cost and radical price-cuts went beyond permissible "fierce" competition. (A 19-20).

4. Respondents lost many customers to Petitioner, and were forced to lower prices to large commercial customers to keep from losing them. (A 20, 22-23).

5. Petitioner's diversion of customers "combined with incidents of advertising and billing which [were] at the very least misleading proved . . . predatory intent." (A 20-21).

The Court of Appeals found a sufficient showing of injury to competition after considering only two of the District Court's findings. (A 6).

Reasons Why the Writ Should Be Denied

1. The interlocutory decisions of the courts below simply mandate compliance with the Robinson-Patman Act.*

2. The decisions of the courts below properly applied well recognized and controlling precedents. The petition requests this Court, prior to trial, to overrule *and* significantly modify two decisions relied upon by the Court of Appeals.

3. Petitioner's price discrimination was motivated by anti-competitive reasons. Therefore, any decision of this Court is unlikely to affect the outcome of the case.

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* Petitioner erroneously contends that the injunction requires it to raise and fix prices. The injunction provides, in part:

"The prices which [Petitioner] shall charge its customers for fuel oil Number 2 shall be solely a matter of [its] business judgment." (A 12).

4. Generally, this Court's review of preliminary injunctions is limited to whether the issuance of the injunction was an abuse of discretion. *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 931-32 (1975). No abuse of discretion is asserted in the petition.

5. Petitioner is not harmed in any way by the injunction, and the petition asserts no harm.

6. The legal positions advanced by Petitioner are unsound.

I.

No Extraordinary Circumstances Exist Requiring Review of a Preliminary Injunction in Advance of the Trial.

Even assuming there were merit to the points raised by the petition, review by this Court is premature.

This Court customarily declines to review a nonfinal order because the facts of the case are not developed or resolved prior to the trial. *American Construction Co.* v. *Jacksonville, Tampa & Key West Railway Co.*, 148 U.S. 372, 384 (1893). *See also Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U.S. 251, 258 (1916) (lack of finality "of itself furnished sufficient ground for the denial"); R. Stern & E. Gressman, *Supreme Court Practice*, 300 (5th Ed. 1978).

The only reason offered for this Court's review at this time is the assertion that there is a "crisis in the price of fuel oil" which, together with "the pressure of inflation" is so extraordinary as to "demand an immediate hearing." This argument is misconceived, since the injunction permits Petitioner to set its prices solely as a matter of its business judgment. (A 12). Furthermore, it cannot be seriously urged that any decision in this case will affect either the price of petroleum or inflation.

II.

Subject Matter Jurisdiction Does Not Depend Upon Injury to Competition.

A. Federal Courts Have Subject Matter Jurisdiction of a Claim Under a Federal Statute.

This Court has consistently held that when a claim is based upon violation of a federal statute, federal courts have subject matter jurisdiction. *Hagans* v. *Lavine*, 415 U.S. 528, 537-38 (1974); *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 249 (1951); *Bell* v. *Hood*, 327 U.S. 678, 682 (1946); *The Fair* v. *Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913). *See Ex parte Watkins*, 7 Peters 568, 571 (1833).

The Complaint alleges jurisdiction pursuant to 28 U.S.C. § 1337 and 15 U.S.C. §§ 15 and 26. Petitioner admitted the action satisfied the commerce requirements of the Robinson-Patman Act. (A 5). The courts below found that Respondents demonstrated probable success on the merits. (A 5, 27).

The Court of Appeals correctly held: "Proof of injury to competition is not a jurisdictional prerequisite, but instead is part of a Robinson-Patman plaintiff's substantive burden in demonstrating a violation of the Act." (A 4-5). Additionally, the Court of Appeals noted that even if injury to competition were jurisdictional, Respondents had made a sufficient showing. (A 11).

Section 2(a) prohibits price discrimination where, *inter alia*, "the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy or prevent competition . . . ." This Court described this statutory language as one of "the conditions which make a price difference legal or illegal." *FTC* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 550 (1960).

Commentators also have concluded that proof of competitive injury is not a jurisdictional requirement. *See, e.g.*, 16B J. Von Kalinowski, *Business Organization: Antitrust Laws and Trade Regulation*, ch. 23 (1978); Rowe, *Discriminatory Sales of Commodities in Commerce: Jurisdictional Criteria Under the Robinson-Patman Act*, 67 YALE L.J. 1155, 1156 (1958).

Petitioner claims that the legislative history of the Robinson-Patman Act suggests that competitive injury is an element of subject matter jurisdiction. The only "legislative history" Petitioner cites is a casual comment made in a 1976 Committee Report of the House of Representatives. This Court has pointed out on previous occasions that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States* v. *Price*, 361 U.S. 304, 313 (1960). *See United States* v. *Philadelphia National Bank*, 374 U.S. 321, 349 (1963).

B. There Is No Conflict Among the Circuits.

Petitioner mistakenly relies upon a Fifth Circuit decision to support its argument that there is a conflict among the circuits on the jurisdictional requirements of the Robinson-Patman Act. *Hampton* v. *Graff Vending Co.*, 516 F.2d 100 (5th Cir. 1975) did not hold that proof of injury to competition was a jurisdictional prerequisite under the Robinson-Patman Act. The only issue on that appeal was whether

"Hampton has failed to prove at least one purchase or sale [was] 'in commerce'." *Supra* at 101.

In an earlier appeal, in the same case, the issue before the Fifth Circuit was whether the price discriminations "have the effect of substantially lessening competition." *Hampton* v. *Graff Vending Co.*, 478 F.2d 527, 529 (5th Cir.), *cert. denied*, 414 U.S. 859 (1973). In this first appeal injury to competition was characterized as one of the "elements" of a Robinson-Patman Act claim. 478 F.2d at 532.

Petitioner also relies upon *Cliff Food Stores, Inc.* v. *Kroger, Inc.*, 417 F.2d 203 (5th Cir. 1969). However, in that case the Fifth Circuit said: "To maintain an action under section 13(a) the plaintiff must *allege and prove*" four statutory elements, including injury to competition. *Supra* at 208 (emphasis added).

In the second *Hampton* appeal, the Fifth Circuit relied upon the decision in *Cliff Foods*, and quoted verbatim the four elements of a Robinson-Patman Act claim. However, the second *Hampton* decision modified the language of *Cliff Foods* and characterized the four statutory elements as jurisdictional. This change in language was unexplained and probably inadvertent. There is nothing in the second *Hampton* opinion which indicates that the Fifth Circuit intended to change the jurisdictional requirements of the Robinson-Patman Act.

In any event, the issue is unimportant in this case. The Court of Appeals found that Respondents made a showing "sufficient to satisfy any jurisdictional requirement, if one had existed." (A 11). This interlocutory appeal from the Second Circuit is not the appropriate case for harmonizing the language of decisions of the Fifth Circuit.

III.

Courts Below Correctly Found Injury to Competition.

The District Court cited numerous factors to support its findings of injury to competition. Petitioner challenges only two of these factors in this Court. The other factors remain unchallenged and are alone sufficient to support a finding of competitive injury.

A. *Utah Pie*

Petitioner contends that the courts below improperly relied upon *Utah Pie Co.* v. *Continental Baking Co.*, 386 U.S. 685 (1967). *Utah Pie* holds that injury to competition may be shown by predatory intent, which can be inferred from proof of below cost sales.

Petitioner concedes that it sold heating oil at below cost in the Northwest Corner. However, it urges that the inference of predatory intent should not be applied to it because it does not possess "huge economic power, huge marketing divisions and huge capital" and there was no showing of inequality of economic power.

The distinction urged by Petitioner is without foundation and would be unsound as a matter of antitrust policy. Furthermore, it would be inadvisable for this Court to consider complex economic distinctions until the facts have been fully developed at trial.

There is no basis in the language of the Robinson-Patman Act, or the decided cases, for the distinction urged by Petitioner. Price discrimination by "any person" is unlawful.

The inference of predatory intent from persistent below cost pricing is sound doctrine in antitrust law. *Utah Pie Co.* v. *Continental Baking Co.*, 386 U.S. 685, 696 n.12, 702 n.14 (1967); *FTC* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 552 (1960); *Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 115, 120 (1954).

Even if Petitioner's argument had merit, resolution of the issue would not change the result here. Petitioner's claim that it lacks economic power has no basis in this record. Petitioner's 1976 sales were $1,000,000 greater than the sales of any Respondent and over seven times greater than the petroleum sales of one Respondent. Petitioner advertised that it could offer prices lower than its competitors because of its buying power and superior storage and delivery capacity.

B. The *Moss* Rule

For the first time, Petitioner contends that the courts below should not have relied upon *Samuel H. Moss, Inc.* v. *FTC*, 148 F.2d 378 (2d Cir.), *cert. denied*, 326 U.S. 734 (1945). *Moss* provides that proof of price discrimination satisfies a plaintiff's initial burden of showing injury to competition and shifts to the defendant the burden of establishing that its acts did not substantially lessen competition. *Supra* at 379.

Nothing turns on Petitioner's argument since, with or without the *Moss* presumption, Respondents fully satisfied their burden of proving competitive injury. Furthermore, this Court has cited *Moss* with approval in three price discrimination cases. *FTC* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 549 n.15 (1960); *Automatic Canteen Co.* v. *FTC*, 346 U.S. 61, 79 n.23 (1953); *FTC* v. *Morton Salt Co.*, 334 U.S. 37, 45 n.13 (1948). In *Morton Salt*, a secondary line price discrimination case, this Court held that a presumption of

injury to competition arises where a manufacturer sells its product to customers at discriminatory prices. 334 U.S. at 50. In *Automatic Canteen,* this Court approved the *Moss* policy of shifting the burden of proof to the party which has at its "peculiar command" the information at issue. 346 U.S. at 79.

The courts below properly relied upon the *Moss* rule. *Moss* is a rule of procedural convenience. It is particularly appropriate to shift the burden of proof on the issue of competitive injury to the defendant in a preliminary injunction proceeding. At that preliminary stage of the case, where the plaintiff has had only limited discovery, the defendant has "peculiar command" of why he is discriminating in price and the impact of such pricing.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: Stamford, Connecticut
February 15, 1979

APPENDIX

Statute Involved

Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a), provides:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however,* That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit

differentials based on differences in quantities greater than those so fixed and established: *And provided further,* That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further,* That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.